National Sea Products, Incorporated *and* Local 385, United Food & Commercial Workers International Union, AFL-CIO. Case 1-CA-17342

February 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 16, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision and in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's recommendation to dismiss the complaint, we further note that the credited evidence indicates Union Representative Stephen Buzzell consented in advance to Respondent's providing an escort for his April 2, 1981, tour of the plant.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on April 2, and an amended charge was filed on May 1, 1980. A complaint issued on July 29, 1980, and the complaint was later amended at the hearing. The hearing was conducted on March 30 and August 12, 1981, in Rockland and Portland, Maine. Briefly, General Counsel contends that National Sea Products, Incorporated (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by unilaterally changing the "plant visits" provision in its collective-bargaining agreement with Local 385, United Food & Commercial Workers International Union, AFL-CIO (the Union), and also by engaging in related coercive conduct. Respondent denies that it has violated the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs of counsel, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Union is admittedly a labor organization within the meaning of Section 2(5) the Act. Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is, and has been for a number of years, the bargaining agent of Respondent's production and maintenance workers at its plant in Rockland, Maine, where it is engaged in the processing, sale, and distribution of fish and related products.[1] Respondent and the Union are, and have been for many years, parties to a collective-bargaining agreement, which provides (G.C. Exh. 2, p. 8):

Plant Visits by Union Representative

> A duly authorized representative of the Union shall be permitted to visit the various plant operations covered by this Agreement for the purpose of observing working conditions and shall also be permitted to check payroll records to see that this Agreement is fully carried out. It is agreed that the Union Representative shall first announce his presence to the Manager of the Plant or his representative and advise as to the reason of his visit. The Union further agrees that his visit shall not interfere with production.

General Counsel alleges in his complaint that Respondent, on or about April 1, 1980, "unilaterally changed the contract provision . . . by restricting access to the plant to certain times and under conditions of escort" and, in addition, on or about April 2, 1980, "had Union representative Stephen Buzzell arrested by police in the presence of employee-members of the Union because he sought access to the plant to enforce provisions of the applicable collective bargaining agreement." The evidence is summarized below.

Barbara Parmelee, personnel manager for Respondent, testified that on April 1, 1980, Union Representative Stephen Buzzell telephoned her at the plant. She was away from her desk and returned his telephone call about 3:30 p.m. that same day. Parmelee recalled that Buzzell wanted to visit the plant at 6 a.m. on the following day April 2. Parmelee noted: "I believe he said specifically he wanted to visit to learn about the job that people performed so he could better represent the people." Parmelee then apprised Buzzell that she would "be getting

[1] Respondent in its answer admits *inter alia*, that the Union is the bargaining agent of its employees and to the appropriateness of the unit as alleged in the complaint.

back in touch with him." Her next telephone conversation with Buzzell was shortly after 5 p.m. on that same day. She recalled this conversation, as follows:

> I indicated that he was welcome to visit the plant, but we would be happy to provide an escort for him so that he could in fact achieve his purpose to learn about the job. . . [He] indicated that his intention was to arrive at 6, to spend the day on the floor of the plant, that if we wanted to provide an escort that was fine, but that was still his intention to be there at 6 and to spend the day on the floor.

Parmelee explained to Buzzell in this conversation that she could not "authorize" his visit to start at 6 a.m. and she would have to "get back to" him.

Parmelee, in a later telephone conversation with Buzzell on April 1, "did indicate that he [Buzzell] was going to have to have an escort and we could provide that at 8:30." Parmelee also telephoned Buzzell subsequently on that same day. Parmelee testified that, on this occasion, she indicated that he (Buzzell) was not authorized to enter the plant at 6 p.m., that if he wished to tour the plant on (April 2), that he was to go to General Manager Michael Smith's office at 8:30 a.m., when Smith would be free and "we would arrange for Buzzell to tour the plant and learn about the job."

Parmelee further testified that:

> Mr. Buzzell indicated that it was still his intention to be there at 6 in the morning and he said: "if you don't like that, you can have me arrested."
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> * * * * *
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> I said, "my understanding is that if you show up at 6 tomorrow morning and attempt to enter the plant, that's exactly what will happen."

Parmelee also testified that Respondent and the Union have been parties to collective-bargaining agreements for at least 15 years; that prior to this particular incident no union representative had ever been denied the right to visit the plant; that during late 1979 there was a change in the union leadership; that Buzzell then became the new union representative; and that Buzzell in fact had visited the plant on at least one occasion shortly after becoming the union representative. Parmelee noted that during Buzzell's earlier visit, Buzzell had "interfered with production in the plant . . . . He struck up a conversation with a production worker who, at that time, . . . stopped doing her job to talk; . . . . We lost product with product damage."

Parmelee reminded Buzzell of this earlier incident during her April 1 telephone conversation. She explained "that one of the reasons that we wanted him to have an escort was that he had interfered with production during the prior visit."

In addition, Parmelee testified that:

> Buzzell's request was made on April 1 for April 2, and we offered to provide an escort because we felt it would be useful to him in learning about the jobs. He could not really learn about them very much just by walking around, and indeed if he were to walk around and try to find out from the employees who were working at the time, he could again interfere with production.

Parmelee, as she testified, explained this to Buzzell. She invited him to be there at 8:30 a.m. on April 2, and he "said he would be at the plant at 6 . . . we could have him arrested if we wanted to." Parmelee could recall no prior union visitation to the plant before 8 or 8:30 in the morning.[2]

Michael Smith, general manager of Respondent's plant, testified that he "was told that Mr. Buzzell wanted to come in" and visit the plant on April 2 at 6 a.m. "to be educated"; "he was new"; and "he wanted to learn how it went" for future negotiations and grievance proceedings. Smith decided "to have people" available to escort Buzzell in order "to tell him what was going on"—"he couldn't learn anything if he just walked around." Consequently, Smith authorized Buzzell to be there at 8:30 a.m. No union agent had ever requested to be there at 6 a.m. and, as Smith further explained, "the only thing conveyed to me was that Mr. Buzzell wanted to come in on a learning experience."

At no time did Buzzell notify Smith that Buzzell wanted to be there at 6 a.m. because "he wanted to see the start-up operation because he had problems." Further, Smith also testified that if Buzzell had stated "that he wanted to come in because there was a problem regarding start up time at 6 a.m.," authorization to enter at that time would have been granted. And, Smith explained that if Buzzell had "indicated that there was a particular problem at a particular time," he would have been permitted to enter the plant at the time."[3]

Stephen Buzzell testified that he was elected to union office in January 1980; that his duties included enforcing the collective-bargaining contract; that shortly thereafter he visited the plant without escort although the chief steward toured the plant with him; and that he also toured the plant on a number of other occasions prior to the April 2 incident. Buzzell claimed that "people [employees] were questioning the start-up time" at the plant—"they were being forced to start earlier" than "they should have" and, consequently, Buzzell wanted to tour

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[2] Production Manager Barbara McClean recalled how Buzzell had visited the plant prior to the April 2 incident and, on that occasion, started "talking with two of the packers on the line" resulting in the loss of product.

[3] David Beaster, chief engineer and security officer for Respondent, testified that he had been instructed by General Manager Smith that Buzzell "does not have permission to enter the building." Beaster so informed Buzzell at 6 a.m. on April 2, and after Buzzell insisted on coming into the building, Beaster called the police who arrested Buzzell. Beaster then heard Buzzell yell to the assembled employees: "See what kind of f—king Company you're working for."

Larry Davis, general foreman for the Company, testified that Smith had instructed him to take Buzzell on a tour of the plant on April 2 "to inform [Buzzell] or to educate him as to the type of work we did"; Smith in fact took Buzzell on such a tour on April 2 after Buzzell was released from jail that morning; and Buzzell, during his tour, raised his hands over his head and said, "We shall overcome brothers and sisters." Earlier that morning, when Buzzell was arrested by the local police, he told the assembled workers: "See what kind of f—king people you work for."

the plant about 6 a.m. "to find out for" himself. Buzzell, as he further testified, spoke on the telephone with Company Representative Parmelee on April 1. He recalled: "I just wanted to let her know that I was going to be at the plant at 6 a.m. on the following day."

Buzzell testified that Parmelee telephoned him later that same day, and:

> [S]he wanted to know the reason why I wanted to be in there at 6 in the morning, and I told her that because of the many problems that we've had in the plant and the many grievances that were pending . . . I thought it was appropriate to be in there early in the morning to find out just what's happening in the plant, and also being a new business agent I would like to familiarize myself with the different positions and the jobs in the plant.

Parmelee then replied: "[W]e just couldn't provide somebody to escort you through the plant at that time." Buzzell asserted that "I didn't need an escort . . . the Company hadn't provided an escort in the past." Buzzell claimed that Parmelee had informed him on April 1 that, "if I arrived at the plant at 6 I would be removed bodily from the plant." Buzzell was in fact arrested on April 2 after he persisted in entering the plant at 6 a.m. After Buzzell was released by the police, he returned to the plant, about 8 or 9 a.m., and toured the facility without incident.[4]

Buzzell could not remember Parmelee mentioning at anytime about his interfering with production during an earlier tour of the plant. Buzzell, in restating the reasons given to Parmelee on April 1 for his 6 a.m. visit, testified:

> To observe the working conditions in the plant, familiarize myself. The first two conversations I had with her was, I mentioned, to familiarize myself with the operation of the plant because I was a new business agent.

Buzzell later added: "And I had many pending grievances." He admittedly never told Parmelee about any "problem with start-up time." He admittedly did not provide management with any "specific or special reason" why he had to be present at 6 a.m. Buzzell also acknowledged that no grievance was ever filed regarding this alleged startup problem. Buzzell claimed that it was corrected by Respondent without the Union ever notifying it about the problem. Buzzell never told them what the problem was.[5]

I credit the testimony of Parmelee, McClean, Smith, Beaster, and Davis as recited *supra*. They impressed me as trustworthy and credible witnesses. On the other hand, I was not impressed with the testimony of Buzzell, Taylor, Dow, and Philip. Insofar as the testimony of Parmelee, McClean, Smith, Beaster, and Davis conflicts with the testimony of Buzzell, Taylor, Dow, and Philip, I find here that testimony of the former witnesses is more complete, detailed, and reliable. In particular, I find here that Parmelee and Smith have truthfully and accurately related the sequence culminating in the April 2 incident. Buzzell was, at times, an argumentative, vague, and evasive witness.

Discussion

It is settled law that "an employer acts in derogation of its bargaining obligation under Section 8(d) and violates Section 8(a)(5) when he unilaterally modifies contractual terms or conditions of employment during the effective period of a contract." See *Boyer Bros., Inc.*, 217 NLRB 342, 344 (1975). In *Boyer*, the employer unilaterally modified that portion of the "plant visitation" contractual provision "by eliminating the word *reasonable* and adding the words *after a grievance has been filed and . . . reduced to writing . . . and after it reaches the third step of the grievance procedure. . . .*" [Emphasis supplied.] Also see *Precision Anodizing & Plating, Inc.*, 244 NLRB 846, 855-857 (1979). However, as the Board explained in *Peerless Food Products, Inc.*, 236 NLRB 161 (1978):

> But not every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to "a material, substantial, and a significant" one, *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), and we do not believe the access limitations imposed here amount to that. From the record, including Respondent's representations on the brief, the net effect of the change in policy is to remove Jacka's former "right" to engage unit employees in conversations on the production floor when those conversations are unrelated to contract matters. While we do not minimize the value of employee access to union business representatives, the change effected here (which does not apply to the job steward) does not materially, substantially, or significantly reduce that value. We shall, therefore, dismiss the complaint.

Applying these principles to the credited evidence of record here, I find and conclude that Respondent, by its conduct on April 1 and 2, 1980, did not act in derogation of its bargaining obligation, by unilaterally imposing a material, substantial, and significant change in its contractual union access clause. The pertinent contractual language permits such access "for the purpose of observing working conditions" and requires the union representative to "first announce his presence" to management and also "the reason of his visit." The union representative "shall not interfere with production."

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[4] Buzzell, in a later conversation with Smith, was assertedly told by Smith: "He was the boss there and he felt that I couldn't visit the plant unless I was given permission by him." Buzzell insisted that he could visit "at any time."

[5] Union Representative Richard Taylor testified that Smith told him, following the above incident, "I run this plant and I will tell you when you can come in and how long you can stay." Also see the testimony of Union Steward Mary Dow.

Employee Nancy Philip claimed that Buzzell told her that he was at the plant on April 2 "to observe starting times" and "he had been told of numerous complaints." Philip never observed a union representative visit the plant at 6 a.m. Philip did not know if management was aware of the alleged reason for Buzzell's visit.

Here, as Personnel Manager Parmelee credibly testified, Union Representative Buzzell "wanted to visit" the plant on April 2 "to learn about the job that people performed so he could better represent the people." Likewise, General Manager Davis, as he credibly testified, was similarly led to believe "that Buzzell wanted to come in on a learning experience" since "he was new." Buzzell did not apprise management that there was a particular problem which could only be observed at certain hours. Consequently, management informed Buzzell that it would "provide an escort" during his tour "because . . . it would be useful to him in learning about the jobs," and "he couldn't really learn about them very much just by walking around." Management also noted that Buzzell, in the past, had interfered with production during a tour and, by providing an escort, he would not have to interfere with the employees on the processing line. However, as management explained, such an escort could not be made available until about 8:30 a.m. on April 2. Buzzell insisted on being allowed to tour the plant at 6 a.m. that day. Union representatives in the past had never toured the plant at this early hour. Buzzell, as found *supra*, withheld from Respondent any specific or adequate explanation as to why he had to be in the plant at 6 a.m. Consequently, management refused to let Buzzell tour at will at 6 a.m. and Buzzell was, as discussed above, arrested. Following his release, Buzzell toured the plant without incident. As for Buzzell's alleged special reason for demanding his 6 a.m. visit, admittedly never relayed to management, the "problem was corrected" by Respondent without union action. Under all these circumstances, I do not find Respondent's conduct to be a material, substantial, and significant change in the access clause. I credit Manager Smith's statement that had Buzzell informed management of a reason why he had to be at the plant at 6 a.m., this isolated incident in the long bargaining relationship of the parties would not have occurred. I, therefore, would dismiss this complaint.[6]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

4. The complaint will therefore be dismissed in its entirety.

ORDER[7]

I hereby recommend that the complaint herein be dismissed in its entirety.

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[6] Respondent, under these circumstances, did not violate Sec. 8(a)(1) by seeking the assistance of local police, as alleged.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.